No. 139.
Brief of Bunn for Appts.

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JAMES H. McKENNEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 139.

EDWIN H. McHENRY AND FRANK G. BIGELOW, AS RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, *Appellants*,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE AND D. C. LAKE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

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A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS.

The Circuit Court of Appeals certifies that upon the cord of this suit pending in that court there arise the lowing questions, to-wit:

1. Had the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?

2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaints respecting the condition of the title thereof?

3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

4. If such was the purpose of the act, was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

5. Conceding that the purpose of chapter 99 of the laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainants to the equitable relief sought?

6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?

—Transcript, p. 29.

For the sake of brevity we will endeavor to condense the court's certificate, as follows:

Upon the record on file in the said Circuit Court of Appeals in this case, now pending before said court upon an appeal duly taken from a decree rendered by the United States Circuit Court for the District of North Dakota, dismissing the complainants' bill of complaint, the following facts appear, to-wit:

That on March 22, 1894, Oakes, Payne and Rouse, as Receivers of the Northern Pacific Railroad Company, in whose place the present complainants have been substituted, filed a bill of complaint in the District Court of Richland County, State of North Dakota, against J. A. Rickert and other defendants named in the certificate, A. D. Stephens, Sumner R. Clarke, D. E. Lake, Lore Alford and S. H. Snider, among others; said bill contained no allegations showing residence or citizenship of any of the above named complainants or defendants; it contained in substance the same allegations set out in the amended bill subsequently filed, and prayed for substantially the same relief as the amended bill.

That on September 5, 1894, Sumner R. Clarke, one of the defendants named in said bill, appeared for the first time in said District Court for Rich-

land County, North Dakota, and filed a petition, duly verified and accompanied by a good and sufficient removal bond, to remove said suit, praying for the removal thereof into the Circuit Court of the United States for North Dakota; whereupon, on the fifth day of September, 1894, the said court granted said petition and made an order for the removal of the suit as prayed.

The petition for removal is set forth in full in the court's certificate; it alleges and shows that there was in said suit a controversy wholly between citizens of different states which could be fully determined as between them, to-wit: a controversy between the complainants as receivers of the property of the Northern Pacific Railroad Company on one hand and the petitioner on the other hand; that Oakes was a citizen of New York, Payne a citizen of Wisconsin, and Rouse a citizen of Ohio, the petitioner a citizen of Illinois; that J. A. Rickert and Charles J. Bade and the County of Richland were residents and citizens of the State of North Dakota; that the controversy consisted in this: that the petitioner for removal, in November, 1889, bought at the sale of taxes in Richland County, for delinquent taxes for the year 1888, certain of the lands described in the bill of complaint, for which he received certificates, and that the lands not being redeemed from sale, the petitioner for removal received tax deeds therefor, which, the petitioner claimed and insisted, conveyed to him a good title; the petitioner attached to the petition a schedule of the lands so purchased by him, which were a part of the lands described in the complaint, and the petition showed that the amount paid by the petitioner for said tax titles was in excess of $2,000.00; that in the suit the complaint sought to avoid and set aside said tax proceedings and deeds; that none of the other parties defendant were interested in the lands so bought by the petitioner; that Rickert and Bade were officers of the County of Richland, and that the county and said officers had no interest in the controversy, having received from the petitioner the tax assessed by it; that the value of the lands claimed by the petitioner under said deeds was more than $5,000.00.

That after the removal of the suit into the Circuit Court, to-wit, July 1, 1895, the complainants filed an amended bill of complaint against the defendants

Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, D. C. Lake, without dismissing the original bill of complaint as against the other defendants named therein.

The court's certificate sets out the amended bill of complaint in full (except as to exhibits).

It appears from said amended bill that the complainants were receivers of the Northern Pacific Railroad Company, which was a corporation created, organized and existing under the act of Congress approved July 2, 1864, and they were appointed by and under decrees of the Circuit Court of the United States. The bill sets forth various provisions of the said federal charter, not necessary to repeat in this statement, the acceptance of said charter by the railroad company, the definite fixing of the company's line of road past the lands in question prior to May 26, 1873, and the filing of a plat thereof with the Commissioner of the General Land Office; also the construction of the road, and that the lands described in the bill were odd sections, co-terminus with said portion of the road, and within forty miles thereof; that when the line was so definitely fixed the lands were not reserved, sold, granted, or otherwise appropriated, and there were no filings or entries, or applications to make filings or entries of any nature whatsoever against said lands in the land office; that the lands were reported by the government surveyors to be agricultural and not mineral.

That long prior to the attempted assessment by Richland County, in 1888, the railroad company had duly claimed said lands before the land department as coming to it under its grant, and had paid to the department the necessary fees; that the land department, in 1888, had not patented any of said lands to the company, but was engaged in considering questions necessary to be decided under the company's charter, in order to determine whether the lands came to the company or not; questions as to whether said lands were mineral or non-mineral, and as to whether the same had been sold, reserved, or otherwise appropriated, and as to whether pre-emption or other claims had attached thereto prior to the definite location of the road; that said determination of said questions of fact had not been made by the land department in the year 1888; that a portion of the lands referred to in the bill of complaint (de-

scribed in one schedule attached to the bill) were patented to the railroad company in 1892 and 1894, and a portion of the lands (described in another schedule attached to the bill) were yet unpatented.

That the lands had not been segregated from the public lands of the United States at the time of the tax assessment; that when the matter should be finally decided by the land department, it would be determined that a part of said unpatented lands was mineral, or not free from pre-emption or other claims or rights at the date of the grant, or at the time the line of railroad was so definitely fixed, while others of said lands would be held by the land department to fall within the grant; that the complainants did not know, could not ascertain and were unable to show, upon information or otherwise, what particular tracts or parcels would be held to fall within the grant, and what particular tracts or parcels still belonged to the United States; that the delay in determination of the status of said lands by the land department was not due to the action of complainants or the railroad company, who had at all times endeavored to secure patents therefor, and had done everything within their power to obtain an identification and segregation of such lands and the issuing of patents.

The first proposition made by said bill and based upon the allegations last referred to was, that the lands in 1888 were untaxable because of the said condition of the title thereof.

The bill then sets up the execution of certain mortgages by the railroad company and the bringing of certain suits, one of them for foreclosure of said mortgages, in which suits the complainants were appointed receivers by the proper Circuit Courts of the United States, and that the said lands were in the possession and control of the complainants as such receivers; the bill further pleads an act of the Territory of Dakota, approved March 9, 1883 (which act is printed in appendix hereto). Briefly stated, the provision of such act is that all railroad companies shall be exempt from all other taxation upon their property in North Dakota, in consideration of paying into the state treasury an annual percentage upon gross earnings.

The bill further pleads an act of the Territory of Dakota, approved March 7, 1889, (which act is also printed in appendix hereto). For present pur-

poses it is sufficient to say that said act provided for exemption of railroad property in 1889 and subsequent years in consideration of payment of a percentage on gross earnings. The bill then sets forth that the Northern Pacific Railroad Company, prior to and during the years 1886, 1887, 1888 and 1889, operated a railroad in said territory; that it did, within thirty days after the passage of said act of March 7, 1889, accept its provisions and became subject thereto according to its terms, and within thirty days after the passage of the same filed with the treasurer of the territory an account of the gross earnings of said company, both local and interstate, for the years 1886, 1887 and 1888, and paid into the treasury of the territory the entire amount of tax and interest thereon claimed by the territory on local and interstate earnings remaining unpaid at the time of filing said accounts, such payments being as follows: For 1886, $38,095.31; for 1887, $65,585,46; and the company further paid into the state treasury at the same time, in accordance with the provisions of the act of 1883, the further sum of $46,937.09, being one-half the entire amount claimed by the territory as due from the company for the year 1888; and further, on or about August 15, 1889, the company paid into the territorial treasury the further sum of $46,937.09, being the remaining one-half of the sum claimed as taxes by the territory under the gross earnings law, for the year 1888.

The bill then sets forth certain alleged irregularities in the assessment in Richland County for 1888, which the bill claimed rendered the said assessment, as well as titles issued thereon, void. It is not necessary to state this portion of the bill, inasmuch as the effect of said irregularities is not certified to this court; the only question touching this part of the case which is certified is whether the complainants can avail themselves in this suit of such irregularities without first offering to pay the taxes properly chargeable against said lands, and this question is based on the assumption that the lands be first determined to be taxable.

The bill further alleges the levy of the tax for the year 1888 upon said lands by the county auditor of Richland County, the placing of said lands on the tax list and the sale of the same for said taxes. The bill refers to schedules attached which

show what portion of the lands described in the bill of complaint were sold to each of the defendants, it being alleged that those purchased by S. H. Snider were assigned by him to the defendants Lore Alford and J. C. Gates (this is obviously the reason why the amended bill drops Snider as one of the defendants and adds Gates, who was not defendant in the original bill).

The bill seeks to set aside said tax titles and deeds as a cloud on title, and prays for a decree that said tax titles be declared illegal, and that the lands described in the bill be decreed to be free from assessment and taxation in said county for the year 1888; that the title and claim of the defendants be adjudged to be void, and their certificates and deeds to be a cloud on the title, and that they be required to deliver up the same for cancellation, and for other relief.

The said defendants, Alford, Gates, Stephens, Clarke and Lake, joined in a demurrer and answer to said amended bill. This demurrer and answer is set forth *in extenso* in the certificate. It is sufficient for present purposes to say that the defendants demurred to the bill, so far as related to those allegations thereof above stated and tending to show that the lands were exempt from taxation, but answered the bill as to the alleged irregularities.

ARGUMENT.

I.

A preliminary question arises as to whether all or any of the questions are so certified as to give this court jurisdiction. It will be noted that the whole amended bill (with omissions of matters immaterial) is certified, together with the petition on which the suit was removed to the United States Court, and the defendants' demurrer and answer; but these papers are not sent up *as* the record in the case below, or a part of it, but are a part of the court's certificate. Doubtless the certificate might have been briefer—more condensed—but its unnecessary verbiage or length (if it be chargeable with that fault) does not make it a bad certificate.

The certificate states the facts on which the questions arise and the whole record is not sent up. The certificate states that the suit is pending in the Circuit Court of Appeals, and that the questions certified arise upon the record.

It was held in *Maynard* vs. *Hecht*, 151 U. S., 324, that the decisions and rules settled as to certificates from the Circuit Court, under sections 650, 652 and 693 of the Revised Statutes, are applicable to certificates from the Circuit Court of Appeals under the act of 1891. 26 Stat. 826, 828.

In *Jewell* vs. *Knight*, 123 U. S., 426, where the previous authorities were examined and fully cited in the opinion of Mr. Justice Gray, the following rules were laid down: 1. The points certified must be of law only and not questions of fact, or mixed law and fact; not such as to involve or imply conclusions or judgment by this court upon the weight or effect of testimony or facts adduced in the cause. 2. The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate. As throwing light on these rules the Court said of the certificate in that case, p. 434:

> "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found.
>
> "The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact."

Again the Court said, p. 435:

> "Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all the circumstances of the case. The first question, whether the six week's delay in taking judgment upon the warrant of attorney made the subsequent sale voidable by the plaintiffs, as well as the second question, whether evidence of the debtor's fraudulent intent and of the preferred creditors knowledge of that intent was requisite to render 'said sale' void as against the plaintiffs, could not be determined except upon a view of all the attendant circumstances. The third question, whether 'such sale,' if fraudulent, would be voidable in favor of the whole or of part only of the plaintiff's debts, could not arise until the sale had been decided to be fraudulent. The fourth and fifth questions frankly submit in two subdivisions the general question whether 'under the circumstances' the sale was fraudulent as against the plaintiffs."

In *Graver* vs. *Faurot*, 162 U. S., 435, the same rules were again laid down and applied to the certificate in that case. The court below had in effect certified to this court whether the facts of that suit brought it under *United States* vs. *Throckmorton*, 98 U. S., 61, or *Marshall* vs. *Holmes*, 141 U. S., 589. As was said by the Chief Justice on page 437:

> "In any view we should be compelled, in answering, to analyze the facts charged * * * to determine whether the facts set up here fall within the same category and direct which decision should govern." See, also, *Cross* vs. *Evans*, 167 U. S., 60.

But this court will not decline to pass on a question of law properly certified, because other questions are also sent up of which the court will not take jurisdiction. *Fire Insurance Association* vs. *Wickham*, 128 U. S., 426. In that case it was held that the question, whether parol evidence might be given to explain the documents offered in evidence by defendant and set forth in the certificate, gave this court jurisdiction.

Applying these principles to this case it will be found, we think, that some of the questions certified are prop-

erly here, while some cannot be considered. "Had the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?" is the first question certified. This depends on the sufficiency of the removal to that court from the state court. We are confident this question cannot be considered. It is not a simple question such as that certified and decided in *Hooe* vs. *Jamieson*, 166 U. S., 395, where the question was "whether or not said complaint sets forth any cause of action, *in which there is a controversy between citizens of different states*, so as to give said circuit court jurisdiction thereof." The clause italicised points the distinction between that question and the one here. Here we are at a loss for the question suggested concerning the jurisdiction. The parties had raised none. One of the defendants removed and the circuit court decreed for the defendants. The plaintiffs do not question the jurisdiction. How can it be determined whether the point goes to the form of the petition, the time of its filing, to its allegations as to jurisdictional amount, or as to whether there was a severable controversy in the suit entitling one defendant to remove, or as to whether such removal would bring with it the whole suit, or as to whether the requisite citizenship was shown in the record? Not only are a multitude of questions submitted in this one inquiry, but this court, to answer them, would need the whole record, would have to examine all its allegations and inferences, and might have to apply almost any one of the multitude of established rules and precedents on the whole subject of removal of causes.

The second question certified is, "Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888, by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?" It is equally clear, we submit, that this question is not properly before the court. The point aimed at is whether the allegations of the complaint show such a condition of the title as make the property subject to taxation under the laws of the Territory of Dakota. Now, to answer this question, this court would have to first examine the

complaint so far as it related to this subject, construe its allegations, draw the proper inferences and therefrom arrive at the true facts of the case. The lower court has simply recited to this court the allegations of the complaint. It is similar, we submit, to a case where the lower court states to this court the testimony given on the trial. This court would not examine the testimony and draw the necessary conclusions therefrom to determine what were the ultimate facts, even although the testimony was given all by one witness. See cases before cited. Next, this court would have to decide whether there was any principle of general law of the United States applicable in territories, or any express legislation of Congress as to the Northern Pacific Railroad Company lands, or any express legislation of Congress as to the Territory of Dakota, or any legislation or principle of the territorial law in Dakota which would subject these lands to taxation or render them exempt. This question attempts to send this whole branch of this case to this court for trial and determination as a court of original jurisdiction.

The third question is this: "Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?" This question, we submit, presents a single, clear and distinct question of law within the jurisdiction of this court, to-wit: whether chapter 99 of the Laws of Dakota for 1883 should be so construed, as to exempt from taxation lands granted to the Northern Pacific by Congress, which were outside of its right of way and not used for railroad purposes.

The fourth question certified is this: "If such was the purpose of the act, was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?" This also, we submit, is one single and clear question of law which can be considered and decided without reference to any other part of the case and without an examination of the record,

and it comes within that class of certified questions which confers jurisdiction upon this court.

The fifth question is this: "Conceding that the purpose of chapter 99 of the laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainants to the equitable relief sought?" This question also, it seems to us, comes within the category of questions which this court will answer upon certificate.

The sixth question is this: "Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?" This is a question, as it seems to us, not properly before this court. In order to answer it the court must examine that part of the record relating to irregularities, several pages in extent, the irregularities alleged being several. It must construe the allegations of the complaint and draw the proper inferences therefrom. It must consider and apply all the laws of Dakota Territory relating to assessments; it must decide what consideration and weight should be given to the allegations of the complaint showing that the property of other railroad companies was not put upon the tax roll for 1888; it must decide whether, under the laws of Dakota Territory, the defects and irregularities alleged go so far to the groundwork of the tax as to make it absolutely null and void, and must consider the further question whether it is possible for the complainants or the court to ascertain what taxes would be properly chargeable against the lands.

II.

But if the question of jurisdiction of the circuit court is properly before this court on the certificate, we submit that the circuit court had jurisdiction.

The record does not contain the bill filed originally in the state court, but the certificate to this court states (transcript, p. 1) that the same contained no allegations showing the residence or citizenship of any of the complainants or defendants, but that it did contain, in substance, the same allegations as the amended bill, which is set forth at length in the certificate. The bill, therefore, showed that it was brought by federal court receivers of a federal corporation. It was therefore a case of which the circuit court would have had jurisdiction independent of citizenship of the parties. The case involved a federal question and was within the jurisdiction of the circuit court, because of its subject matter, but the petition for removal alleged and relied on adverse citizenship as the ground of removal. The suit was removed by one of the defendants under section 2 of the act of August 13, 1888 (25 Stat. 434). The first clause of the act which provides for removals on the ground of subject matter, gives the *defendants* a right to remove. Under this clause it is not questioned that *all the defendants* must join in the petition. It has been the construction of all the removal acts that the word "defendant" or "defendants" is construed to mean the "party defendant;" that is, all the defendants. Therefore the case was not properly removed to the circuit court on the ground of subject matter.

The next clause gives *all the defendants non-residents of the state* a right to remove on the ground of citizenship. The petition for removal did not bring the case under this clause.

The removal must rest upon the third clause of the statute, which says: "*And when in any suit mentioned in this section* there shall be a controversy wnich is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit," etc. This clause is general and applies *to all suits mentioned in the section;* this must include those mentioned in the first clause or subdivision, which involve federal questions and would be removable on the ground of subject matter on petition of all the defendants. But under the third clause or sub-

division *part of the defendants* may remove the same suits. The subdivision must be held to apply to all the suits mentioned in the section, giving the language of Congress its reasonable and literal effect. Moreover, there would appear no reason why right to remove to a federal court for citizenship should not exist *because* the suit involves also a federal question, which, of all other questions, is peculiarly for the federal court.

Removal under this subdivision takes the entire suit, (*Barney* vs. *Latham*, 103 U. S., 205,) and there would appear to be no doubt that this suit involves a severable controversy. It is a suit including a large amount of land in which the railroad company claimed an interest, brought against a number of defendants who had tax titles, each defendant holding, as shown by the bill, distinct and separate deeds on different lands. The suit related entirely to the tax of 1888, sold in 1889, and the bill showed what lands were bought off at that sale by each one of the defendants. No one defendant had the slightest interest in the land claimed by another defendant. Whether they could be joined in one suit in equity is not now before the court, but assuming that they could be joined, each defendant must of necessity have a separate trial and decision—not necessarily a trial separate as to time and form, but in substance separate, because each defendant claims different and distinct land. The controversy in such a case comes within the language of the act, and is wholly between the plaintiff and each defendant, and can be fully determined as between them without the presence of any other defendant. No one defendant has, either directly or remotely, any interest in any decree the court may make as to any other defendant, except as such decree may establish a legal precedent. The case comes within the decision in *Barney* vs. *Latham*. See language of Mr. Justice Harlan, pp. 213-214-215. The test of jurisdiction was well and sufficiently stated by Mr. Chief Justice Waite in delivering the opinion of the court in *Fraser* vs. *Jennison*, 106 U. S., 191.

> "To entitle a party to a removal under the second clause of the second section of the act (of 1875), there must exist in the suit a separate and

distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of the other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." See, also, *Mitchell* vs. *Smale*, 140 U. S., 406; *Merchants' Cotton Press & S. Co.* vs. *Insurance Co.*, 151 U. S., 368.

In this case the petition showed the proper citizenship, to-wit, the three complainants being citizens, one of New York, one of Ohio, one of Wisconsin, and the removing defendant a citizen of Illinois. It is now well settled by the decisions of this court that a citizen of Illinois, being sued in a state court in North Dakota by a citizen of New York, can remove the suit to the federal court. Such a suit is one of which the circuit court has jurisdiction under the first section of the act of August, 1888. It is hardly necessary to call attention to the fact that this act does not change the language of the separable controversy subdivision of the act of 1875, except that it takes away the right to remove from the plaintiff. The decisions, therefore, under the act of 1875, are good authority under the present law.

The County of Richland and officers of the county, who were joined as defendants in the bill filed in the state court, were at most merely formal and unnecessary parties. It is doubtful if they were even proper parties, for they had issued the tax titles and received the tax, *had no interest in the controversy* and no relief appears to be prayed against them in the bill. Their citizenship, is therefore, immaterial.

There is a question of practice, suggested rather than stated, in the certificate, to-wit: whether the amended bill was properly filed in the circuit court after the removal, against a part of the defendants named in the original bill, without dismissal of the original bill as to such omitted

defendants. It is hardly necessary to suggest that this question of practice ought not to be dignified by treating it as being material to the jurisdiction of the court. Its answer either one way or the other does not affect the jurisdiction. Even if the practice was improper, and if the circuit court acted irregularly in entertaining the amended bill and entering a decree thereon, the only remedy is by appeal.

III.

Believing it clear that the court will not consider the second question certified, we pass to the third. Was it the purpose of Chapter 99, Laws of Dakota for 1883, to exempt these lands in consideration of the gross earnings tax? Or, in other words, was the percentage on gross earnings levied in lieu of all other taxes on the land grant lands (as well as on the railroad of the company)?

The answer to this question must depend on a fair reading of the act. The act is not doubtful in meaning. It says, sec. 1:

> "In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances or appendages thereof, or *upon any other property situated in this territory, belonging to the corporation owning or operating such railroads*, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid, etc., (a percentage as specified of the gross earnings of operating the railroad)."

Again the act in the same section says:

> "And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid."

The same section makes such percentage

> "a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed."

The act, sec. 5, says:

> "The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are

sold, leased, or contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D., 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of Dece ber, A. D. 1882."

This act had n preceded by an act (Session Laws Territory of Dak 1879, c. 46. p. 122) providing for a gross earnings tax—

> "in lieu of all other taxation * * * of the roadbed, right of way, station or depot grounds, tracks, rolling stock, water stations," etc., etc., "*used in or incident to the operation of such railroad.*"

The act of 1879 provided for the taxation of all other property of railroad companies like that of individuals. If anything were needed to make it more clear that the act of 1883 was intended to cover these lands (for this intent is about as clear as words could make it), it is the deliberate and marked change in language from the act of 1879 to that of 1883.

The act of 1883 specifically enumerates the railroad, its equipment, appurtenances, or appendages, its capital stock and business transactions, and adds "or upon any other property situated in this territory." The specific words cover all property used in the operation of the railroad and the general words cannot be wholly rejected.

Moreover, section 5 must be wholly eliminated from the act in order to say that the act does not apply to the lands.

It is important to bear in mind that when the act of 1883 was passed the Northern Pacific land grant, eighty miles in width, extending over four hundred miles in length through the territory from one end to the other including many of its best lands, must have occupied a

foremost place in the mind of the legislature. It cannot be conceived that the legislature intended, in the act of 1883, to ignore the question of taxing this land, or to make any uncertain provision on the subject.

This question was elaborately argued, and was decided in 1892, in the state court of North Dakota, which state succeeded the territory as the public body entitled to these unpaid taxes. The decision in favor of our contention has never been questioned on this point by any subsequent decision and should, we submit, control here. The case is hardly distinguishable from that of a state court construing a statute of the state.

The act was also undoubtedly modeled after the policy and legislation of the adjoining and older state, Minnesota, where, from the admission of the state in 1857, railroads had paid a similar gross earnings tax, the immunity extending to granted lands. And in that state it was before 1883 the settled law that such laws did not provide an *exemption*, but a special system of taxation and were to be liberally construed. *City of St. Paul* vs. *St. Paul & Sioux City Ry. Co.*, 23 Minn., 471; *State* vs. *N. P. R. R. Co.*, 32 Minn., 298, 299; *State ex rel. Marr* vs. *Luther*, 56 Minn., 156.

IV.

(a) The most important question is the fourth: whether the gross earnings law of 1883 was void as transgressing the limitations placed on the power of the territorial legislature. These limitations were of course in the act of Congress organizing the territory. The only provision of this act, we believe, relied on to avoid the statute, is section 6 of the organic act. 12 Stat., p. 241; Rev. Stat. U. S., sec. 1925.

> "And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property

of residents; nor shall any law be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

As we understand, the grounds of objection to the validity of the act of 1883 amount to this: that a railroad company, in respect to a land grant, is in precisely the same condition as any other owner of real estate; and therefore classification, which provides a special method of taxation as to them, is arbitrary and unwarrantable, and amounts to a discrimination prohibited by section 6 of the organic act.

But it is elementary, as said by Chief Justice Marshall, in *McCulloch* vs. *Maryland*, 4 Wheat., 415, that the power to tax is an absolute power, which acknowledges no other limits than those expressly provided in the constitution, and it may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. Taxation is a branch of legislative power and ordinarily a legislature has the perfect right to make exemptions, or to classify property, to determine what property shall bear the burden of taxation, and to tax one class of property by one rule, another class of property by a different rule. The only limitation upon this power is that expressly or by necessary implication imposed in the organic act.

What are then the limitations imposed by said organic act? The provision is obviously a limitation, but not we think of the kind contended for. There are two essential elements in the imposition of every tax; first, selection of the object which shall pay the tax; second, fixing the rule according to which it shall be apportioned. Both these questions were within the power of the territorial legislature, except so far as limited by said section 6, organic law. It certainly cannot be doubted that the section did not limit the legislative power in respect to selecting the subjects of taxation. If it did, then it would have prevented the legislature from making any exceptions from taxation whatsoever, and have made it incumbent upon that body to tax all property, which

from its nature or character was susceptible of taxation. The legislature could not in that case except educational institutions, or churches, or burying grounds; it could not exempt a limited and reasonable amount of personal or real property; it could not exempt mortgages, indebtedness or stocks. There are examples of constitutions which provide flatly that all property shall be taxed, except that certain enumerated exemptions may be made. Minnesota has such a constitution. Section 3, Article 9. It was adopted from Ohio. With these two exceptions we know of no similar constitutional provisions, and it has been held under these provisions in both states that the legislature cannot make exemptions except those enumerated. These decisions rest on two grounds: first, on the express requirement that laws shall be passed taxing all property; second, that the expression of certain exemptions which may be granted infers the exclusion of other exemptions. But, as the Supreme Court of the State of North Dakota well said in *Northern Pacific R. Co.* vs. *Barnes*, 2 N. D. Reports, 310–330:

> "But it has never seriously been doubted that the legislature had the power to make such exemptions from taxation as it saw fit. The power has certainly been exercised, without question or objection, ever since the organization of the territory. Every revenue law has contained provisions exempting certain kinds and species of property, and it would be with great reluctance and only upon the most cogent reasons that this court would, at this late day, cast doubts upon the validity of the exercise of a power that has so long been supposed to exist, and that has been exercised for more than thirty years without question or objection."

We believe it has never been doubted, under state constitutions similar in form to the enabling act of Dakota, that the legislature may select the property which shall bear the burden of taxation. It may exempt mortgages and other indebtedness, it may say that homesteads shall not be taxed, it may exempt a certain amount of personal property, it may say that horses shall be taxed but cows not. This power is a part of ordinary legislative power, unless the legislature is shorn of it by or-

ganic law, and the power is clearly recognized in the act in question by the words "but all property *subject to taxation* shall be in proportion to the value of the property taxed."

It is therefore clear that the words "nor shall any discrimination be made in taxing different kinds of property" were not intended absolutely to prevent everything that might in the broadest sense be termed "discrimination," for this language is modified by the following clause, the two connected together by the disjunctive "but." To understand what Congress meant both clauses must be read together, and one as modifying and interpreting the other. All discrimination was not prohibited. This is plain from the power of the legislature to select the property which should be subject to taxation, and the necessarily inferred power of omitting certain property or class of property, or granting exemptions.

This clause was under consideration in the case of *Ferris* vs. *Vannier*, 6 Dakota, 186, where Tripp, Chief Justice, said:

> "Congress has prohibited discrimination, which must be construed to mean unjust discrimination—a discrimination in favor of one kind of property as against another; a discrimination which prevents each kind of property subject to taxation from bearing its fair and equal share of the burden imposed on all. In this sense the words are aptly chosen; in any other they are meaningless and lead to absurd results. Under this construction we are free from many perplexities in which courts have found themselves in determining whether laws which were not discriminating were uniform. The disjunctive clause with which this provision is connected further limits and explains it. Standing alone it might be construed to mean that all property of every kind must be taxed equally without discrimination; but the words 'subject to taxation,' limiting the words and clause of which they form a part, extend their limiting power to the principal clause which the disjunctive clause itself limits, so that the meaning of both construed together is that there shall be no unjust discrimination in the taxation of the different kinds of property subject to taxation, but all such property

shall be taxed in proportion to its value. These words, 'subject to taxation,' are of importance in the construction of this section. Without them, all property would be subject to taxation; with them, only certain property is liable to taxation. Who is to determine what property is 'subject to taxation?' The courts cannot determine. It is a legislative function. It can only be exercised by the legislature or by Congress. Congress has not seen fit to exercise it, but has given to the legislature the absolute control over 'all rightful subjects of legislation,' saving and reserving to itself alone the right to modify it or annul the same. This certainly is a rightful subject of legislation, and it follows that Congress has given to the legislature the right to apportion and subject property to taxation. The legislature, then, has a right to say what property shall be subject, and what property shall not be subject, to taxation; what property shall be taxed, and what property shall be exempt from taxation—limited only by the provision that all property so subject to taxation shall be taxed without unjust discrimination in favor of one kind of property as against another, so that every kind of such property shall be taxed in proportion to its value."

The State Supreme Court of North Dakota subsequently held in *Northern Pacific Railroad Company* vs. *Barnes*, 2 N. D., p. 332, that this decision established beyond doubt two propositions, viz: (1) that the territorial legislature had full and plenary power to select the subject of taxation; and (2) that section 6 became operative only upon such selected subjects, and was absolutely of no effect in respect of property not selected for taxation.

If the power to exempt is conceded, it must necessarily follow that this includes the power to commute; also, it includes the power to classify. If horses may be exempted, the state may lawfully accept a payment in lieu of other taxation or ordinary taxation on horses. The greater power includes the less. So, if the legislature might exempt wild lands, for example, and levy all the taxes on cultivated or productive lands, this would include the power to accept a sum of money from the owner of wild land in lieu of ordinary taxation.

The only limitation on these legislative powers would be that there should be no unreasonable discrimination. It may be that, under the same circumstances and conditions, A. should be treated like B. An exemption of A.'s farm from taxation, while the farm of B. and all other persons were taxed under the same circumstances, we may safely concede, would be forbidden by the organic act; but classification is permissible providing it rests on some reasonable basis; and what such basis shall be, or whether any given basis of classification is reasonable, is mainly and ordinarily a legislative question. The courts cannot interfere except in cases where it is made plain that there is no reason for the classification, which is therefore purely arbitrary and discriminating.

The territorial law classifies real estate into two classes: first, lands ordinarily and generally; second, land grants of railway companies. Is there any reasonable basis for the classification? Railroad lands are classified by themselves, and there is no discrimination as between lands of different railroad companies. Is this classification a purely arbitrary one? A railroad corporation is public in its character, operates a public highway for the public benefit, must carry for all alike without discrimination in favor of any person or individual, and is subject to the rule that its charges must be reasonable. In all their operations such corporations are subject to public regulation. They are public to that extent that it is now well settled public taxes may be levied to aid their construction. Railroad companies are uniformly classified by themselves for the purpose of legislation, and with equal uniformity we believe they are classified by themselves in all the states for the purposes of taxtion.

But in respect to their land grants it will be urged that they are in precisely the same position as any other land owner, and that, therefore, any classification of railroad companies as to their land grants is arbitrary and discriminating. It will be noted that the so-called exemption is not gratuitous, but is paid for upon a basis that seemed fair and just to the legislature. Whether the law is wise or not is not for the court to determine.

It is impossible for the court to say whether the three per cent. tax on gross earnings would raise more, or less, revenue than would be raised by ordinary taxation; impossible, for the court, therefore, to say whether any discrimination exists, or whether, if it exists, it is against the railroad companies, or in their favor. Large public benefits were expected to follow the gross earnings tax system, providing a revenue certain to be received and easy of collection, made by the statute a lien prior to any other claim against all property of the company. It avoided the public expense of levying taxes on each parcel of land and the expense and litigation necessarily accompanying such a system of taxation.

And a railroad company as owner of a land grant is not in fact in the same position as other land owners. There is a genuine and fundamental reason for the classification attempted. Ordinary land owners may erect buildings upon their lands, may improve and cultivate them, raise crops upon them, make them income-bearing property. They may do what pleases them with their land. If sold, they may apply the proceeds to any purpose whatever, and in an infinite variety of ways make them a source of profit. The Northern Pacific Railway Company holds its lands (and the same, we think, is true of all other land grant roads) upon a trust. The lands of the Northern Pacific Company were granted to it by Congress (see section 3, act of July 2, 1864) "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." By section 10 no mortgage could be made without the consent of Congress. The lands, it will thus be seen, were held upon trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. And Congress, by joint resolution passed May 31, 1870, authorized the road and lands to be mortgaged "to aid in the construction and equipment of its road." Another large part of the intent of Congress

was to secure the settlement of the country within the limits of the grant, and this was doubtless also an important factor in the eyes of the Dakota legislature when it passed the act of 1883. The lands held on this trust while in the hands of the company could not be made productive; they could not be built upon, cultivated, improved and made a source of income by the company. They were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, to the purpose of paying off the mortgages, the money raised upon which had constructed the road. Whatever burden of taxation was laid upon the lands would necessarily tend to advance their price, and would by so much retard the sale thereof and the settlement of the territory of Dakota.

We may well call attention to the pointed language of the Supreme Court of Minnesota upon a similar gross earnings law in that state, *City of St. Paul* vs. *St. Paul & Sioux City Railroad Co.*, 23 Minn., 471, where the court said:

> "It is part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and prop-

erty; and, instead of a general and local s
tem of taxation, the payment of a fixed *per cen*
of their annual earnings into the state treas
for the benefit of the whole state was provided
in lieu of all taxes whatsoever. This, it was s
posed, would prove less vexatious and burdens
to the companies, especially in the infancy of th
existence; ultimately more advantageous and p
ductive to the revenues of the state, and clea
more just and equal to all localities therein, as
would share equally in the benefit to acc
from taxes raised and contributed on account
property held under franchises derived from
whole people. Experience is fast demonstrat
the wisdom of this policy and realizing the
pectations of its founders."

And for these reasons more fully expressed in
opinion of that court, the Supreme Court of North
kota in the Barnes Case (before cited) held that th
were lawful and reasonable grounds upon which
legislature of the territory might classify land-gr
lands in one class and ordinary lands in another cla
and levy taxes as the act of 1883 provided. See opin
of the court, 2 N. D., pp. 347-351.

The weight of judicial authority in the states in
cisions touching constitutional provisions quite sim
and analogous to that of the organic law of Dakota
clearly in favor of our contention. We shall refer
court to some of the more important decisions in
states upon this question without going into unnecess
detail in respect to them. In the older states there
commonly no constitutional restriction on the power
taxation. In the more recent constitutions many s
restrictions have been introduced.

The constitution of Wisconsin provides, "The rule
taxation shall be uniform and taxes shall be levied u
such property as the legislature shall prescribe." T
provision, we think, does not differ from the Dakota
ganic act. To say that there shall be no discriminat
is substantially to say "the rule of taxation shall be u
form." Under the constitution of Wisconsin the quest
had been very much mooted and had been passed on
touched upon by different decisions of the Supreme Co

from an early day, which decisions were not altogether consistent with each other. The question finally came before the Supreme Court of that state in *Wisconsin Central Railroad Company* vs. *Taylor County*, 52 Wis., 37. It was elaborately considered by the court in its opinion, page 57 and subsequent pages, and the exemption of railroad lands was held valid.

The constitution of Iowa (adopted 1846, Sec. 30, Article 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes; * * * and in all * * * cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College* vs. *Iowa*, 46 Iowa, 275.

Section 1, Article 11, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company* vs. *Morris*, 7 Kan., 210. And in *Francis* vs. *Railroad Company*, 19 Kan., 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed*, was not in violation of this constitution. The opinion of the court distinguishes constitutions providing that *all* property shall be taxed, and holds that, under the Kansas constitution, the legislature has power to exempt.

The constitution of Louisiana provided "taxation shall

be equal and uniform throughout the state. After 1848, all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co.* vs. *New Orleans*, 24 La. An., 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans* vs. *Kaufman*, 29 La. An., 283, it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans* vs. *Davidson*, 30 La. An., 554, and *New Orleans* vs. *Fourchy*, 30 id., 910.

The constitution of Michigan adopted in 1850 provided "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And Section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People* vs. *The Auditor*, 7 Mich., 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * * The legislature has the power of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation." Pages 90–91.

Manning, J.; said also:

> "There is nothing in the constitution in express terms inhibiting the enactment of the law by the legislature. * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See also the opinion of the court by Judge Cooley in *Youngblood* vs. *Sexton*, 32 Mich., 406.

The constitution of New Jersey adopted in 1875 provided "property shall be assessed for taxes under general laws and by uniform rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Ex'rs* vs. *Runyon*, 41 N. J. Law, 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co.* vs. *Commonwealth*, 79 Pa. St., 100, it was held that an act taxing coal companies on their franchises and property according to the amount of coal mined is constitutional. Agnew, C. J., said in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example, can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or of farms or mills, or houses and lots, cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed a certain rate, and saying that the owners of these horses and mules shall be taxed

at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem.* The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot perform duties. Taxes shall be uniform, because of the right of the citizens to bear no more than equal burdens. * * * But without the power to classify men, as well as things, this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business, measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." These provisions seem to be much stronger than those of the organic act of Dakota, and yet in *Mississippi Mills* vs. *Cook*, 56 Miss., 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and

woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Missouri of 1820 provided "that all property subject to taxation in this state shall be taxed in proportion to its value." It was held in *Crow* vs. *State*, 14 Mo., 237, that this provision did not prohibit the legislature from making exemptions. See also *Hamilton* vs. *St. Louis County Court*, 15 Mo. 3; *State* vs. *North*, 27 Mo., 464, 483.

The constitution of Illinois provides "the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central Railroad Company from ordinary taxation in consideration of paying into the state treasury a per centage on its gross earnings was held valid in *Illinois Central Railroad Co.* vs. *McLean*, 17 Ill., 291. In the case of *Hunsaker* vs. *Wright*, 30 Ill., 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the Circuit Court in all criminal cases, for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting, the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed

higher than another species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will be found to sustain our contention. *State* vs. *Crittenden County*, 19 Ark., 360; *St. Louis R. R. Co.* vs. *Berry*, 41 Ark., 509; *Arkansas Midland Ry. Co.* vs. *Berry*, 44 Ark. 17; *Cairo Railroad Co.* vs. *Parks*, 32 Ark., 131; *Memphis Railroad Co.* vs. *Berry*, 41 Ark., 436.

In *Northern Pacific Railroad Company* vs. *McGinnis*, 4 N. D., 494, the court overruled the Barnes case, but on the theory (at least as to a portion of the court) that the question involved was a federal question and that the decision of Judge Caldwell and District Judge Thomas in *Railroad Company* vs. *Walker*, 47 Fed. Rep., 681, was binding on the state court.

(b) It has been sometimes objected to this and similar acts that they are invalid as to the interstate earnings, or any proportion thereof, of railroad companies; this on the ground that they impose a tax on interstate commerce.

The first answer to such a proposition, as applied to this case, is obvious, and it seems to us conclusive, viz: that the railroad company has paid its tax according to the claim of the Territory of Dakota, and has paid both on its state and interstate earnings. If the act were void as imposing a tax on interstate earnings, it does not lie in the mouth of a third person, after the tax has been paid, to raise the question of invalidity of the law on this ground. The railroad company, on whom is imposed the invalid tax, is the only person who could raise the question. Courts do not sit to declare legislative acts void unless the question is properly presented by a party in interest having a right to object to the law; or, in other words, unless the question is necessary to be passed upon in order to decide the case. In each case as it arises, the court, being required to declare the law of that case, must apply the constitution as the paramount law. The constitutional objection will consequently not be listened to unless a party makes it appear clearly that his rights are actually affected, and that a decision on the validity

of the law is necessary. The constitutionality of a statute can be taken advantage of by those only who have a right to question the act. *Cooley's Constitutional Limitations*, 163, 164, 180, 181. The railroad company, having paid the alleged invalid tax, would be estopped to recover it back. *Daniels* vs. *Tearney*, 102 U. S., 415.

But if the constitutionality of the law upon this ground were properly before the court, the recent decisions of this court, as we understand them, leave little room to doubt that the law would be sustained. The tax is not a tax on earnings as such, but is a tax on the railroad and other property of the company. Because of the difficulty—not to say impossibility—of fixing upon the cash value of the property of a railroad company, the legislature has chosen to measure that value by its earning capacity. The provision that a fixed per centage of gross earnings shall be in lieu of all other taxes whatever on the property, clearly shows that the legislature levied the tax as one upon the property of the company, not upon its earnings, state or interstate, as earnings. And the tax was not levied upon franchises, or upon the privilege or right to do business. Franchises and privileges, and the right to do business in the state are nowhere mentioned in the act. *Adams Express Co.* vs. *Kentucky*, 166 U. S., 171; *Adams Express Co.* vs. *Ohio State Auditor*, id., 185; *Henderson Bridge Co.* vs. *Kentucky*, id., 150; *Adams Express Co.* vs. *Ohio*, 165 U. S., 194; *Western Union Telegraph Co.* vs. *Massachusetts*, 125 U. S., 530; *Massachusetts* vs. *Western Union Telegraph Co.*, 141 U. S., 40; *Maine* vs. *Grand Trunk Railway*, 142 U. S., 217; *Pullman's Palace Car Co.* vs. *Pennsylvania*, 141 U. S., 18; *Delaware Railroad Tax Case*, 18 Wall., 208.

(c) If it be argued, as it sometimes has been, that the Dakota law violates the Fourteenth Amendment to the Constitution of the United States, the conclusive answer is to be found in the decisions of this court. This court has repeatedly held that the Fourteenth Amendment does not oblige the states to adopt an equal and uniform plan of taxation. It was not "intended to compel a

state to adopt an iron rule of equal taxation." *Bell's Gap Railroad* vs. *Pennsylvania*, 134 U. S., 232; *Home Insurance Company* vs. *New York*, 134 U. S., 594; *Pacific Express Co.* vs. *Seibert*, 142 U. S., 339; *Giozza* vs. *Tiernan*, 148 U. S., 662; *Adams Express Co.* vs. *Ohio* 165 U. S., 194, 228. The remarks which we have made in regard to classification, as permissible under the organic law of Dakota, are pertinent to classification with reference to the Fourteenth Amendment. And as sustaining the Dakota act in question we might well refer to the Ohio decisions, reviewed and commented upon in the *Adams Express Company Case*, 165 U. S., the constitution of Ohio being fully as strong to restrict legislative action as the Dakota organic law.

V.

The fifth question is whether, "Conceding the territorial law of 1883 to be valid and to apply to the property in question, are the payments upon the gross earnings of the company for 1888 alleged in the bill sufficient to entitle the complainants to the equitable relief sought?"

The allegations of the bill show payment in full of the amounts claimed by the Territory against the gross earnings of the company for 1888, and those payments made in the year 1889. There were two equal payments of $46,937.09 each, the last one made August 15, 1889. We are not clear as to just what question of doubt was in the mind of the Circuit Court of Appeals when it certified this question. The parties we believe requested no such question to be certified, and treated this case at the Circuit as if the allegation were sufficient. If any doubt can be entertained on the subject, it must we think refer only to the inquiry as to the time of these payments; as to whether, in other words, the payments were made on or before the day fixed by law. Such a question, we insist, cannot be raised by the defendants. The allegation of the bill is clear that the company paid this money, amounting to nearly $94,000, and being the full sum claimed by the Territory to be due; the Territory accepted and retains the money; it had undoubted power, even if the payments were not ex-

actly on time, to waive the mere matter of time and accept them. At least no third person having no direct interest in such moneys has any standing to say that the payments were not in time.

While it would perhaps be going too far to claim that the state officers could estop a territory or its counties by such receipt of the money in case the law under which it was paid was unconstitutional, still it may well be held that the acceptance of such money and its retention by the Territory will estop the public authorities and all claiming under them from raising a mere technical objection, that the money was not paid on the exact day when it was due. Courts of equity love to relieve against forfeitures. Forfeitures are not favored by the law and the Territory could clearly waive its right to insist on a forfeiture. *Carver* vs. *Jackson*, 4 Pet. 1, 87; *Fletcher* vs. *Peck*, 6 Cranch, 87; *Randolph County* vs. *Post*, 93 U. S., 502; *Murphy* vs. *Packer*, 152 U. S., 398.

But the payment was in time. As to the tax of 1888 the time of payment was controlled by the act of 1883. If the time of payment specified in the act of 1883 was in any wise changed by the act of 1889, such change had reference to the act of 1889 only; that is, railroad companies were to pay upon the time specified in the act of 1889, as a condition for their property being exempted in 1889 and years subsequent thereto. So far as the exemption for 1888 was concerned, that could be secured by payment according to the terms of the law of 1883. Even if section 7 of the act of 1889 should be construed as providing that companies in default should pay their full taxes in default within thirty days after the passage of that act, the penalty named by that section is "before they can avail themselves of the provisions of *this act.*" And that "any company failing to strictly comply with the provisions of this act within the term herein provided, shall be immediately subject to assessment and taxation," meaning of course subsequent assessment and taxation. Again, further on in the section it is provided, that companies shall make defaulted payments due under the act of 1883 within a certain time "or *the same*,

(*meaning this act*) shall not apply to such company or companies."

The act of 1883, it will be noted, contains no provision such as that, in default of payment upon the day named, the lands or property of such company shall become subject to ordinary taxation; the only penalty being that for default a sum may be added to the gross earnings tax, distraint may be made therefor, and the property of the company is subjected to a lien for the payment of the tax and penalty. On the contrary the law of 1889 introduced this new feature: that if the company did not pay its taxes on or before certain dates, the lands should thereupon become subject to ordinary taxation. But the taxes in question were levied for the year 1888 and the law of 1889 could not authorize and was not intended to authorize an assessment *for 1888*, because the terms of the law of 1889 were not complied with. Indeed, the taxes complained of were levied in 1888 before the law of 1889 was passed.

It is most clearly a proper construction of the law of 1883 that the tax on the gross earnings of any given year was to be paid in two equal payments, February and August of the *following* year. The law could not be put into operation on any other construction. The tax, for example, on gross earnings for 1885 could not be paid half in February, half in August of 1885, because neither the company nor the state could tell what the earnings were until the close of the year 1885. The law clearly gives a month and a half after the close of each year for the company to determine and report its earnings and make its first payment. Indeed, it is identical with the ordinary plan of taxation on all property. Other property is assessed, the tax levied and extended in one year, but it commonly falls due during the next year.

It seems clear to us that no change in this particular was intended to be introduced by the law of 1889, and that this court fell into an error in *Northern Pacific Railroad Co.* vs. *Clark*, 153 U. S., 252, as to the dates when payments were due under the act of 1889. This view is not important because such suggested error was

immaterial to the decision, the company having paid no gross earnings tax for 1889, and not offering to pay any, and it being due when the bill was filed. This error is suggested simply as bearing upon the construction which the court may give to the law of 1883. It is of necessity universally true in states where gross earnings taxes are levied, like Wisconsin, Minnesota, formerly North Dakota, that the law provides payment of a percentage in each year upon the gross earnings of the prior year.

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Counsel for Appellants.

APPENDIX.

CHAPTER 99

OF LAWS OF DAKOTA TERRITORY, 1883.

COLLECTION OF TAXES ON RAILROAD PROPERTY.

AN ACT TO PROVIDE FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

SECTION 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say:

Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half ($\frac{1}{2}$) on or before the fifteenth day of February, and one-half ($\frac{1}{2}$) on or before the fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits

and the correctness of such abstracts, full power is hereby vested in the Governor of this Territory, or any other person appointed by law, to examine under oath the officers and employes of said company, or other persons, and if any person so examined by the Governor or other authorized person shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centums, it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the Territory shall have and take precedure of all demands, decrees and judgments against said company.

SEC. 2. *Where Company shall Fail to Make Return.* If any railroad company in this Territory shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent of the tax imposed upon such company by this act. And the treasurer of the Territory shall forthwith ascertain the amount of such tax justly due from such company as nearly as may be from such evidence as may be available, and shall thereupon collect such tax, as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the Territorial Treasurer as in this section provided shall, together with the said penalty thereon, be by him entered in the books of his office; and such entry, when so made, shall stand in the place of the report required by law to be made by such company; and shall, in all courts within this Territory, be evidence of the amount of such tax and penalty, and of the other facts stated therein in pursuance of this act.

SEC. 3. *Neglect to Pay Taxes.* In case any railroad company shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof, as a penalty for such failure or neglect to pay.

SEC. 4. *Territorial Treasurer to Distrain.* At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this act, the Territorial Treasurer or his deputy shall distrain sufficient goods, chattels or other movable property, if found within this Territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided; and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when and the place where such property shall be sold. Such sale shall take place at some point on the railroad of such delinquent company, and at least four (4) weeks notice of the time and place of such sale shall be given. Such delinquent company, its successors or assigns, may pay any such taxes and penalty at any time before the sale of property distrained as herein provided; and thereupon

further proceedings in connection with such distress shall cease, and the property distrained be surrendered to the owner thereof.

SEC. 5. *Lands Subject to Taxation.* The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased or contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this Territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of December, A. D. 1882.

SEC. 6. *How Tax Apportioned.* The moneys received and collected by the Territorial Treasurer in pursuance of *the* (this) act shall be disposed of by him as follows:

One-third (⅓) hereof shall be retained in the Territorial Treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which railroads *respectfully* (respectively) run in proportion to the number of miles of main track situated in such counties respectively.

SEC. 7. That all acts or parts of acts in conflict with this act are hereby repealed.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved March 9, 1883.

CHAPTER 107

OF LAWS OF DAKOTA TERRITORY, 1889.

LEVY AND COLLECTION OF TAXES ON RAILROAD PROPERTY.

AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

SECTION 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company there

shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this Territory, both upon Territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this Territory which shall have accepted this act shall pay to said Treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings, "and for and in each and every year after the expiration of such five years an amount equal to two per cent. of said gross earnings," and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

Said payment shall be made, except as hereinafter provided, one-half on or before the fifteenth day of February, and one-half on or before the first day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the Treasurer of this Territory on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the Treasurer and Secretary of such company, and, for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the Governor of this Territory, or any other person appointed by law, to examine under oath the officers, employes of said company or other persons, and if any person so examined by the Governor or other authorized person shall knowingly or wilfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury, and for the purpose of securing to the Territory the payment of the aforesaid per centum, it is hereby declared that the Territory shall have a lien upon the railroad of said company, and upon all property, estate, or effects of said company whatsoever, personal, real or mixed, and the lien hereby secured to the Territory shall have and take precedence of all demands, decrees and judgments against said company.

SEC. 2. *When Company Shall Fail to Make Return.* If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent. of the tax imposed upon such company by this act, and the Treasurer of the Territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

The amount so ascertained by the Territorial Treasurer as in

this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office, and such entry when so made shall stand in the place of the report required by law to be made by such company and shall, in all courts within this Territory, be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

SEC. 3. *Neglect to Pay Taxes.* In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

SEC. 4. *Territorial Treasurer to Distrain.* At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the Territorial Treasurer or his deputy shall distrain sufficient goods, chattels or other movable property if found within this Territory to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when, and the place where such property shall be sold; such sale shall take place at some point on the railroad of such delinquent company, and at least four weeks notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns may pay in such amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease and the property distrained shall be delivered to the owner thereof.

SEC. 5. *Land Subject to Taxation.* The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased, and on or before the first day of April of each year each railroad company having lands within this Territory shall return to the county clerk of each county within this Territory full and complete lists, verified by the affidavit of such officers of the company having knowledge of the facts, of all lands of such company situated within such county sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased prior to the last day of December, 1888.

SEC. 6. *How Taxes Apportioned.* The moneys received and collected by the Territorial Treasurer in pursuance of this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained in the Territorial treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such companies run, in

proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent. of the tax paid by such company shall be retained in the Territorial treasury for the use of the Territory, and forty per cent. shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, and thirty per cent. shall be apportioned among the several counties in which lands forming a part of its land grant is situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

SEC, 7. *Any Railroad Company* Which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the Secretary of the Territory. accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99 of the laws of 1883, shall, within thirty days after the passage of this act, pay into the Territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both Territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and the taxation of the property of individuals of this Territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings, both Territorial and interstate, or by filing an account of gross earnings, both Territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account, and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the Territorial Treasurer on or before the fifteenth day of August, 1889. Any railroad company that may be hereafter organized in this Territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this Territory, may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall, at the time of filing

such acceptance, render an account of gross earnings, both Territorial and interstate, in the manner as hereinbefore provided, and shall pay, at the time of rendering such account, all amounts claimed by the Territorial Auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to three per centum of such account, as follows: If such acceptance is filed on or before the fifteenth day of February in any year such company shall pay one-half of said amount on said fifteenth day of February and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to three per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter, accounts shall be rendered and payments made in the manner provided in this act; *Provided*, that any company failing to promptly and strictly comply with the provisions herein set forth, and to pay all sums herein provided to be paid, shall be subject to assessment and taxation in the same manner as individuals.

SEC. 8. *In Case of Non-acceptance.* The railroads and property of all railroad companies owning or operating lines of railway in this Territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

SEC. 9. *Repeal or Amendment.* This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

SEC. 10. *Effect When.* This act shall take effect and be in force from and after its passage.

Approved March 7, 1889.